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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable James Donato, Judge

IN RE GOOGLE PLAY STORE ANTITRUST LITIGATION	**NO 21-md-02981-JD**
THIS DOCUMENT RELATES TO:	
Epic Games, Inc. vs. Google LLC, et al., Case No. 3:20-cv-05671-JD	
In Re Google Play Consumer Antitrust Litigation, Case No. 3:20-cv-05761-JD	
State of Utah, et al. v. Google LLC, et al., Case No. 3:21-cv-05227-JD	
Match Group, LLC, et al. vs. Google LLC, et al., Case No. 3:22-cv-02746-JD	

San Francisco, California
Thursday, August 3, 2023

TRANSCRIPT OF PROCEEDINGS

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Thursday- April 20, 2023 **10:20 a.m.**

P R O C E E D I N G S

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THE COURT: Good morning.

VOICES: Good morning, Your Honor.

THE COURTROOM DEPUTY: Please be seated.

Calling Civil 20-5671, Epic Games, Inc. versus Google, LLC; Civil 20-5761, In Re Google Play Consumer Antitrust Litigation; Civil 21-5227, State of Utah versus Google, LLC; Multidistrict Litigation 21-2981, In Re Google Play Store Antitrust Litigation; and Civil 22-2746, Match Group, LLC, versus Google, LLC.

Counsel.

MR. BORNSTEIN: Good morning, Your Honor. Gary Bornstein for Epic.

MR. REITER: Good morning, Your Honor. Joseph Reiter for the Match plaintiffs.

MS. WEINSTEIN: Good morning, Your Honor. Lauren Weinstein for the states.

MS. NAM: Good morning, Your Honor. Hae Sung Nam for the consumers.

MR. POMERANTZ: Good morning, Your Honor. Glenn Pomerantz for Google. With me at counsel table are two of my colleagues, Justin Raphael and Rebecca Sciarino.

MR. ROCCA: Your Honor, it's Brian Rocca and

Michelle Park Chiu, Morgan Lewis, for Google.

THE COURT: Okay. All right. So it was a productive hot tub Tuesday.

I've decided I need a little bit of follow-up with respect to Dr. Singer, so here's what I'm going to do. I'm going to send out a couple of questions by Monday. If I can do it this week, I will. It's unlikely, and so by Monday or Tuesday. And then it would be directed to Dr. Leonard and Dr. Singer, couple things I want them to do for me. I don't have to have them back in, but I do need sworn declarations so I can treat it like in-court testimony. I don't have to drag everybody back, but that will be fine. And they are going to prepare it. It's not going to be drafted by lawyers; it's going to be just as if they were testifying and aren't doing the hot tub. So I'll send those questions out. I'm going to need it fairly quickly. I want to get this decided by first week of September if I can, because we're getting close to trial date.

So it's just going to be Singer and -- Dr. Singer and Dr. Leonard. Those are the only two who will be involved. Okay? It won't be that many questions. It should be actually relatively easy for them to answer, I would hope, but who knows. So otherwise those are under submission.

Let's talk about summary judgment. I think one or two of these I may be able to give you a disposition from the

bench, but let's start with, they're all Google's motions. The one I want to start with is the plaintiffs' claims that Google unlawfully prohibits the distribution of other apps on the Google Play Store.

MR. POMERANTZ: Thank you, Your Honor. I'm Glenn Pomerantz for Google.

Your Honor, what we tried to do in this motion is read your opinions on summary judgment before we ever got here. So you will see no cussin' or spinnin', and we are going to try to filet this case a little bit, and we think this is one in which the law is clear.

So the policy is that a developer can distribute its apps through the Play Store, but it cannot use -- it cannot use Play to distribute a competing app store. And, Your Honor, the law is clear that we have no obligation to do business with our competitor.

THE COURT: Right. So, I mean, this is -- this is basically in your view a refusal to deal claim. There's no duty to deal. I agree with all that. But your colleagues on the other side say they're not basing their Section 2 claims on a refusal to deal theory. So --

MR. POMERANTZ: So, right. They're saying --

THE COURT: Now, it's okay in my view -- and I'll hear your view. You know, there's sometimes called the monopoly broth. It's okay to have carrots, celery, onions and

thyme all bubbling in the broth without necessarily calling out the celery as, you know, an offensive conduct element for which you seek relief. I can't really tell on this record whether there is, in fact, a refusal to deal or not. It's very hard.

Look, here's the thing with contracts, particularly when you have sophisticated entities involved. They're not going to flat out say you are forbidden to do business with "X". People are too smart for that. They're just not going to do that. But the contract may have that effect. There may be evidence around the contract that indicates that, in fact, it was intended to accomplish that without necessarily having a smoking gun put right into the content of the document.

So I'm also concerned about some fact issues, but look, they're not going to ask for damages based on refusal to deal. Maybe they'll say that they have this issue, you'll prove at trial that there's no restrictions, that never happened.

MR. POMERANTZ: No, Your Honor. This is actually not that kind of a case. We actually do have a restriction right in our contract that says you cannot use Play to distribute a competing app store. And our argument, Your Honor, is that that cannot be part of the broth as a matter of law.

So this is different. There's no factual dispute.

They -- there is a contract, and it says what everybody knows it says. And so you cannot distribute a competing app store through Play. That -- and they say, well, that would be lawful if it were in isolation, but, hey, we're throwing it into the broth, and therefore we can use it to support the monopolization claim. In fact, all of their claims.

Can I hand Your Honor a notebook that has a few things that would be helpful?

THE COURT: Okay. Yes.

MR. POMERANTZ: May I approach, Your Honor?

THE COURT: Sure, just hand it to Ms. Clark.

THE COURTROOM DEPUTY: You have an extra one?

MR. POMERANTZ: I do. I have two extra ones if you need it.

THE COURT: Thank you.

MR. POMERANTZ: So, Your Honor, if you would turn to Tab 1, this is a case, a decision by Judge Pfaelzer in the *Masimo* case.

THE COURT: Oh, yes, I know it well.

MR. POMERANTZ: I saw your name there, so I assumed you might remember it.

And if you look at the page, the second page, what Judge Pfaelzer says in that case is that: "*Masimo* throws into the "mix" every potential allegation of misconduct without regard as to whether such conduct is truly anticompetitive.

Despite this Court's willingness to consider a monopoly broth, this Court cannot allow *Masimo* to stretch these holdings beyond their intended purpose." And then the last sentence that I highlighted here: "The holding does not allow for clearly legal acts to be thrown into the mix to bolster a plaintiff's antitrust case."

THE COURT: Yes.

MR. POMERANTZ: There is a clearly legal right for any company, even a monopolist -- Judge -- then-Judge Gorsuch said in the Novell case, even a monopolist has the clearly legal right not to do business with its competitor, and here --

THE COURT: Well, but here's the issue, Mr. Pomerantz. I just ... the plaintiffs say -- and we'll hear from them in just a second -- "plaintiffs do not" -- this is Section 4.5 of the DDA, right?

MR. POMERANTZ: Yes, that's the issue.

THE COURT: That's the overt description.

Okay. This is right out of their opposition brief. This is document number 511-1, page 5: "Plaintiffs do not assert liability against Google for Section 4.5 of the DDA on its own. Rather, plaintiffs challenge the thicket of restrictions Google employs to foreclose competing stores, which includes Section 4.5." So --

MR. POMERANTZ: On its own. That's the key there.

What they're saying is if all we did was to have Section 4.5, well, they wouldn't have a case. But they can throw this clearly legal act into the broth.

Masimo says no, and Judge Boasberg in the recent *Facebook* case said no, citing *Masimo*. In that *Facebook* case, what the FTC alleged was that Facebook had done several things that together constituted a violation of Section 2. They acquired Instagram, they acquired WhatsApp, and they made their Facebook not interoperable with their -- with Facebook's competitors. What Judge Boasberg said is that last thing where they made it that it was not interoperable, that's out.

THE COURT: Well, let me ask you this: What is it you're asking? I mean, I think you may be asking, you can tell me, you're trying to ask for an order saying that the plaintiffs are just forbidden from even mentioning Section 4.5 at trial.

MR. POMERANTZ: That's a different question. What they cannot do --

THE COURT: Well, tell me, what is it you want? All they're saying is they want to mention it at trial.

MR. POMERANTZ: They cannot mention it. In mentioning it, they're trying to make it part of the broth. They cannot mention it.

THE COURT: But that's --

MR. POMERANTZ: I don't know that it will come in

for any other purpose, Your Honor.

THE COURT: That's the only reason it would ever come up.

MR. POMERANTZ: Then it can't come in.

THE COURT: So you would say they're actually barred from even mentioning Section 4.5?

MR. POMERANTZ: Well, if the only reason -- again, I don't know what else they would argue, but if the only reason for offering it is in order to say it's part of the broth, then it is -- cannot be admitted, because it's a clearly legal act. That's *Masimo,* that's *Valassis*, that's the *Facebook* case. All of them say that.

The monopoly broth is not there to say anything in the world can go into it. A clearly legal act cannot. And we all know from *Trinko* all the way back to *Colgate* more than a century ago, a business has every right to decide who it's going to do business with and who it's not going to do business with. It's a clearly legal right.

In fact, in the *Epic v. Apple* case, what the Ninth Circuit recently decided, when it got to the UCL claim it said even the UCL, it can sweep in a lot of things, but what it can't sweep in is something that's already been determined to be clearly legal, and they specifically gave *Colgate* as an example.

THE COURT: Well, of course. The UCL prong is

expressly unlawful conduct. I mean, that is --

MR. POMERANTZ: I'm sorry. I --

THE COURT: The UCL expressly says unlawful conduct, I understand that.

Okay. Mr. Bornstein.

MR. BORNSTEIN: Thank you, Your Honor. Gary Bornstein for Epic.

The court reporter asked us every time to make sure we get the names out there.

THE COURT: Yes, that's a good practice.

MR. BORNSTEIN: So, Your Honor, let me start with what Your Honor has gotten to in the questioning of counsel for Google. This is an effort to keep information from the jury. That's what this motion is. And if the jury is sitting and looking at the full range of conduct that Google has engaged in, the jury needs to understand there are agreements with OEMs that prevent certain methods of distribution of app stores, there are agreements with carriers that have the same effect, there are agreements with developers that have the same effect, and there needs to be an understanding on the part of the jury of Section 4.5 that closes off the last available method for distribution on top of the OEMs, the carriers, the developers and the sideloading.

So if the jury is not informed, if this information is kept from them, as Google now has acknowledged is the

function of this motion, the jury is going to make a decision about the competitive effects of this conduct in the dark.

THE COURT: Well, how about this. I'm just thinking out loud here, and I'm sure you're way ahead of me, but I might be able to see a theory of, okay, let's say, you know, a concerted refusal to deal is not in itself actionable, a proposition that you probably agree with. I won't press you on that right now, but I could see maybe Section 4.5 coming in almost on a state of mind theory just to show Google knew what it was doing. All these other provisions and this one go to the state of mind of wanting to exclude, in an impermissible fashion according to plaintiffs, competition for the app store.

So you're just tendering it to show it's not a mistake or just a coincidence or some kind of random correlation of disparate factors. It was, in fact, an intentional thought out agenda, and Section 4.5 is part and parcel of the proof that this was intended to be the effect. I could see a state of mind with a limiting instruction.

MR. BORNSTEIN: I don't --

THE COURT: Would that be enough for you? How about that? Can you live with that?

MR. BORNSTEIN: I don't think that would be sufficient, Your Honor, for a number of reasons.

First of all, the jury's task is going to be on rule

of reason claims, which we're talking about right now, to assess the actual competitive effect of the conduct. The intent of Google may be relevant for the jury to assess what those effects are, but the jury has to know and the jury has to make a conclusion about what the effect of the conduct is. And if we can't say to the jury, for example, if I can't put a witness on the stand to say, I wanted to distribute my store through Google Play and they told me, no.

THE COURT: Under Section 4.5.

MR. BORNSTEIN: Under Section 4.5, that's right.

If I can't have -- if the consumers can't have a consumer on the stand and say, I wanted to download something through Google Play, and I was told it wasn't available because of Section 4.5.

THE COURT: Well, how do you get around the brilliant lawyering in *Masimo* that resulted in Judge Pfaelzer's opinion?

MR. BORNSTEIN: Well, Your Honor, I am glad you asked the question, because I am very surprised to see counsel hand up to Your Honor an excerpt of the *Masimo case*.

THE COURT: It did look a little short.

MR. BORNSTEIN: It is a lot short, Your Honor, and it has the language that Google likes, and it omits the language that Google clearly doesn't like.

So, Your Honor may recall from your prior life that

there were a number of different elements of conduct that were alleged to have been anticompetitive in that case, and Google has pointed the Court to two elements of the conduct that were at issue, which were patent infringement and product disparagement.

Another portion of the opinion discusses these equipment financing programs that Tyco had, and the Court says, and I'll read the part that's not in the binder that was given to you. The Court says that: "When considered on their own, Tyco's equipment financing programs are arguably not exclusive; however, when viewed in conjunction with" a variety of other conduct the Court then lists, quote, "it is possible that a jury could find the overall combined effect is de facto exclusive and substantially forecloses the market."

And what the judge says, Judge Pfaelzer says at the beginning of the opinion, is that the Court needs to exercise some flexibility to assess whether a particular form of conduct should come in as part of the broth or should not. And it's not a bright-line rule. There is no case with a bright-line rule that says a refusal to deal can never come in. It's something the Court needs to consider on a case-by-case basis as to whether or not the particular conduct at issue should be considered as part of the broth. That's what Judge Pfaelzer did in *Masimo* by slicing the conduct in different ways, and that's actually what happened --

THE COURT: The --

MR. BORNSTEIN: I apologize, Your Honor.

THE COURT: I was just going to say -- go ahead, finish that thought.

MR. BORNSTEIN: I was just going to say the same thing happened in the ***Klein versus Meta*** decision that Your Honor inherited from Judge Koh, where Judge Koh held, and then Your Honor repeated in citing her prior opinion, that even though there were certain activities, which in that case were a refusal to deal that Facebook was engaging in, refusal to access API, the platform, that a plaintiff could "still state a Section 2 claim by alleging a series of practices that are anticompetitive, even if some of the activities would be lawful if viewed in isolation." That's a direct quote from Your Honor's quote of Judge Koh.

THE COURT: No, I understand, and that is my inclination, but -- so I'm not going to tie your hands. I know we're 120 days or so away from trial, but so at least you're thinking at this point you're going to have one witness come in and say, I wanted to do "X", but Section 4.5 was held up as -- by Google to say I couldn't do it.

MR. BORNSTEIN: I do intend, Your Honor, to have at least one witness come in and say, we understood we couldn't do it, right, because we read the rules. I don't know that I'll have someone to say, I asked and I was told this is what

the rule says. I just don't know the answer to that question, Your Honor.

THE COURT: I understand.

MR. BORNSTEIN: And I certainly would intend to examine Google witnesses to draw out the fact in existence of this policy, their intent to enforce it, and so forth.

THE COURT: In conjunction with all those other contracts you intend to put on.

SPEAKER: That's precisely right, Your Honor.

THE COURT: Okay. Okay.

MR. POMERANTZ: May I respond, Your Honor?

THE COURT: Yes, just closing thoughts. Then I want to get to the next one.

MR. POMERANTZ: Okay. There's a difference between an act which the law has determined to be clearly lawful and an act which could or could not be lawful. Here, when the act has been determined by law to be clearly lawful, the portion I read from ***Masimo*** is what applies. What Mr. Bornstein is talking about is where an act could be or could not be lawful depends on other things.

Here, there is no dispute that it is clearly lawful under ***Trinko***, ***Colgate*** and a lot of other cases, that we don't have to distribute competing app stores. That's a clearly legal act.

So, Your Honor, it cannot be used as part of the

broth. If they think there's a different way to bring it into evidence, we'll have to hear it. I didn't hear it today. All of that sounded like he wanted that to be part of the broth. But if it comes into evidence at all, then we need a clear instruction to the jury that we have an absolute right to tell -- not to distribute a competing app store. The jury needs to know that so they're not misled and think that that can be part of the broth, because it cannot be as a matter of law under *Masimo*, under *Facebook*, under *Valassis*, under *Trinko*, under *Colgate*. It cannot be part of the broth.

THE COURT: Part of it is I'm not -- I understand what you're saying. It does sound like it would be coming on the liability end, but it's hard to say so far from trial that would be the only grounds for it to come in.

MR. POMERANTZ: Well, I haven't heard a different ground. That's why I'm not ruling it out. All I'm saying is --

THE COURT: Although we're three months away. I mean, you know.

MR. POMERANTZ: If there was -- yes, if there was --

THE COURT: The nervous owl flies at dusk. They're going to figure all this out right before trial.

MR. POMERANTZ: All I'm saying is the ruling that we're entitled to is that as a matter of law, it cannot be part of the broth. If they come in with some other theory

that Your Honor thinks is relevant, then we'll need a limiting instruction. We'll need to make -- the jury needs to know it can -- it is a clearly lawful act to refuse to distribute your competitor's store. That's clear under the law, absolutely clear.

THE COURT: Okay. That will be under submission. I'll get a short order out on that soon.

All right. Let's go to the per se versus rule of reason labeling for the ...

MR. POMERANTZ: For the Games Velocity Program, Your Honor.

THE COURT: Right.

The concern I have is I don't know if I -- there are a lot of fact issues that are packed into that, and I'm not sure at this stage I can do it. My inclination is to defer it and see what proof at trial looks like, and then we'll just do it before we get the final jury instructions. So that is -- I mean, I -- I would like to hear what you have to say, but I just, I'm not feeling equipped enough to know what the evidence is going to say, and this is an evidence-based decision.

MR. POMERANTZ: I understand, Your Honor.

THE COURT: In my view.

So my inclination is to pass it to, you know, some point in trial, clearly before the jury's instructed, but I

don't think I can do it right now. But what do you think?

MR. POMERANTZ: Okay. So let me start by saying what we are arguing and we're not.

So these agreements, these Games Velocity Program agreements, only Epic and Match are seeking a per se claim here. The state -- and they added that, if Your Honor remembers, near the end or at I understand of discovery. The states and the consumer class have not sought a claim based on per se. They saw the same evidence; they didn't choose to amend their complaint.

There really is no dispute about what these agreements are. These agreements are vertical, and in which Google Play says to important customers, their developers who make popular games, and they say, we want you to be in our store. Our users like your game. We want you to be in our store.

And so what we said to them, and it's crystal clear, it's exhibits -- gave you an example, exhibits 10 and 11, they don't dispute it, that what these agreements say is that if the game developer will give their games, their new games or update to games to Google Play at the same time they give it to the Apple App Store or to another Android store, Android app store, then Google Play will pay them through credits on advertising and cloud services. And that is classic pro-competitive behavior, paying -- giving your customer a better

deal so they continue to do business with you. Classic pro-competitor.

But what the -- what Epic and Match are saying is there was another term to the agreement that wasn't written down, but the parties agreed to it. And that is that the game developer agreed they would not open up a competing app store. Now, we say that wasn't part of the agreement, they say it was, but we --

THE COURT: Well, that's the issue.

MR. POMERANTZ: For the purposes -- no, it's not. For purposes of this motion, we accept it. We accept it. For purposes of this motion, we accept it.

So what you have, even under their theory, is an agreement that has a whole bunch of vertical, you know, consideration going back and forth, plus a horizontal one. That's their theory. And we cited the law that says that when you have that kind of a hybrid case, hybrid agreement, it has vertical components and it has a horizontal component, it cannot be per se unlawful. Because vertical agreements, as Your Honor knows, you know, there's all sorts of pro-competitive reasons why you might do various things, and the *Frame-Wilson* case and the *Dimidowich* case, they make crystal clear that if you have that kind of a vertical and horizontal hybrid, it cannot be per se unlawful.

What the cases say is in order for it to be per se,

you need to have a naked horizontal agreement, a garden variety agreement. And there is no way to look at the Games Velocity Program agreements, even if you tack on their horizontal agreement, even if you tack it on. And they can't pull out that horizontal agreement and say, hey, we're only challenging that part of it, because it's part of an overall deal. And their interrogatory responses, it's exhibits 12 and 13 to my declaration in support of this motion, they admit that the written agreement is part of the deal, and then there was this added agreement.

THE COURT: Okay. But I mean, this is just a big bundle of facts, and I'm not really all that comfortable --

MR. POMERANTZ: None of those facts are undisputed. I'm accepting their horizontal agreement solely for purposes of this argument.

THE COURT: All right. Let's hear from Mr. Bornstein. Go ahead.

MR. BORNSTEIN: Thank you, Your Honor.

I'll start perhaps by making it easy for the Court, but we're obviously quite content to have the Court handle this in the way that Your Honor suggested was your inclination at the beginning of this section of the argument.

To respond to some of the observations, I think it makes sense to divide the issues between the fact issues and the legal issues. I hear Mr. Pomerantz saying, and it does

simplify things to say they accept for purposes of this argument that this horizontal agreement does exist not to compete, not to open an alternative app store. So I will set aside my wonderful argument about what the facts are Your Honor should look at. You'll trust me that my wonderful argument exists.

As to the legal piece of it, there is no hard, bright-line rule of law of the sort that Mr. Pomerantz is advocating, that anytime you have a horizontal agreement not to compete, which we've now said we'll assume for purposes of this discussion, that you can layer in vertical elements and shield it from per se scrutiny. Complexity is not a defense to per se unlawful behavior, that is clear.

For example, the ***Palmer*** case. This is a Supreme Court decision. It has vertical elements; it has horizontal elements. The Supreme Court said this is an agreement that should be reviewed under per se scrutiny. And there are cases that Mr. Pomerantz has referred to just now, like ***Frame-Wilson*** and ***Dimidowich*** which are easily distinguishable. I mean, ***Frame-Wilson***, for example, was strictly a vertical agreement between Amazon --

THE COURT: I'll take care of that.

Let me ask you this. What are you planning, just at a high level, not tying your hands, how are you planning to present this at trial? What are you going to do with it?

MR. BORNSTEIN: Sure. What we intend to do, Your Honor, through the witnesses we're able to bring, and that's something we're still working out, and maybe we'll get to the pretrial exchange portion of this discussion later, is put on evidence that shows that Google and these third parties, the ones we've identified in our papers, reached an agreement not to compete; that these horizontal potential competitors would not open an app store.

I mean, if I could point Your Honor, for example, to one thing which I will introduce in evidence and I can't currently say in open court because of the claim of confidentiality, but it's sitting there on page 7, line 12 of our brief. It is a direct quote from a Google document that I will put into evidence that makes clear there was an agreement according to Google's own language. So we will put in documents like that, and we will solicit testimony from relevant witnesses showing that this agreement exists, and we will, to the extent necessary, rely on the legal arguments to show why that should be addressed as a per se matter.

THE COURT: All right.

MR. BORNSTEIN: I think ultimately the jury will have to decide what the facts are, and with the benefit of Your Honor's instruction, they will know which standard to apply, whether to apply a per se standard if they find facts to be "X", or a rule of reason standard if they find the facts

to be "Y".

THE COURT: Okay.

MR. POMERANTZ: Your Honor, if I could just briefly respond?

THE COURT: Very briefly, yes.

MR. POMERANTZ: Whether a case is subject to the per se rule or the rule of reason is not something you leave to the jury to decide, like Mr. Bornstein just said. It is typically decided either at the motion to dismiss or summary judgment stage, because lawyers need to know how to try the case. If it's per se, what they're saying is all we need to prove is the agreement. But they have a rule of reason claim on this very same thing, so we know we're going to be putting in evidence about the anticompetitive effects, the pro-competitive benefits of this agreement, all things considered. So that's going to the jury.

So the question is would the jury ever be instructed that, hey, if you reach an agreement you don't need to consider all the rest of this stuff, and that's just not the law.

THE COURT: Well, look, the most I might do, the most -- and I'm going to take this under submission and I'll reflect -- the most I might do is make a highly preliminary decision that may be changed as evidence is introduced at trial. So that's the most you're going to get, because I

don't think this is something that is readily disposable of on the facts as I currently have them.

Okay. That's under submission.

Now, the early Android carrier agreements.

MR. POMERANTZ: Thank you, Your Honor.

THE COURT: Well, the plaintiffs have said that they don't -- this is in Docket 511-1, page 14, note 7. Plaintiffs say that no plaintiff is going to use those facts about the carrier agreements to seek damages prior to the four-year limitations period. So problem solved. They're not going to do it.

MR. POMERANTZ: Your Honor, they shouldn't be allowed to point to those in support of their claim. They -- what they're trying to say is we're not going to seek damages before 2016, but of course they can't seek damages before 2016. There's a four-year limitations period.

THE COURT: They can use some table setting. I mean, I don't have any problem with a little bit of table setting. Plaintiffs have expressly renounced they're going to make any argument for damages or anything else based on those older agreements.

MR. POMERANTZ: Okay. Your Honor, if you could turn to page 7 -- tab 7 in the binder, and I'll take whatever blame. I have chosen to give you just the relevant excerpts in order for Your Honor not to have so much paper. If you

tell me the next time you want me to put the whole case in there with the tab --

THE COURT: No, no, no.

MR. POMERANTZ: -- I'll be happy to do that.

THE COURT: We have this wonderful thing called Westlaw, where I can get all of this for free.

MR. POMERANTZ: And law clerks, too. So you got both of those.

THE COURT: Yes.

MR. POMERANTZ: So here's the *Klehr* case from the Supreme Court, and the language --

THE COURT: But let me just jump in.

This is not a bootstrap. This is just -- this is table setting. This happens all the time. Here has been the pattern and practice. Now, we can't get -- for reasons that the jury will be told, they can only get damages for this period of time, but it's been a long -- just speaking off the top of my head, this has been a longtime practice of the company, make no mistake, this is part and parcel of who they are and how they do business. It started here, it ended there. We're talking in this case about this specific time period. I mean, they don't need to have a straitjacket on a little of the table setting.

MR. POMERANTZ: No. But if it's going to come in, Your Honor, it can only come in with a clear instruction based

on Klehr. That is, the jury -- but they can't do --

THE COURT: No, that's not true.

You will say in your closing argument, you heard about these, what are they, Android -- early Android carrier agreements. Those are not part of anything you should take into account in determining damages, if any, that you're going to hold my client responsible for, or words to that effect. Okay? They don't need -- this is not that complicated, so ...

MR. POMERANTZ: But then, Your Honor, I just think I need an instruction that says that what I'm saying is in fact correct, because it's part of the instructions in the case.

THE COURT: You can ask as we get through the evidence at trial. We'll see how it goes, we'll see what the plaintiffs actually end up doing with it, but that one is denied. There will be no further written order on that. I'll have some notes in the minute order.

So the plaintiffs, that's with your understanding -- sorry, you can add something. It seems relatively clear in the footnote, but I don't want to deny you an opportunity.

First of all, you embrace the footnote, right? Page 14, note 7, that's the plaintiffs' pledge, all plaintiffs. You're not going to use --

SPEAKER: No plaintiff in this case is seeking damages -- I'm sorry, Hae Sung Nam for the consumer plaintiffs.

No plaintiff in this case is seeking damages beyond the limitations period.

THE COURT: And you're just going to use it as kind of a, as I said, I've been calling it table setting, you can call it whatever you want, but part of the story. It's part of the narrative art.

MS. NAM: You're correct, Your Honor. It is part of the story, and we have not alleged that, you know the carrier agreements were the sole cause of plaintiffs' harm. However, you know, based on the continuing violation doctrine, it is a continuous course of conduct that starts in 2009 with these agreements and continues to this day. So we believe that any damages -- if, if the -- to the extent the carrier agreements are found to be anticompetitive and cause foreclosure, plaintiffs' damages would flow from that conduct.

THE COURT: Well, okay. Look, I'm banking on Footnote 7. Okay? So that's -- I'm going to hold you to that, which means you can talk about this a little bit in the narrative art, but that's it. Okay? And we'll see what you say at trial. I'll be listening carefully. But that will be the disposition. Okay?

All right. Thank you.

MS. NAM: Thank you, Your Honor.

THE COURT: Okay. Now, the last one -- oh, no, two more. Okay. Antitrust standing for IAP damages claims.

Mr. Pomerantz.

MR. POMERANTZ: Yes, Your Honor.

So this argument is based on the markets that the plaintiffs have defined in their complaints and that their experts have testified about, and if you turn to tab 13, I have a little description of those markets, pictorial description, that I think would aid you.

So the plaintiffs alleged two markets. The first is what they call their Android app distribution market. So I'm going to take a moment to describe it. This is not the focus of this part of our motion. This is not part -- what we're arguing, this first market. In this market, this is the two-sided market, and the consumers and the developers are both dealing directly with Google Play in order to consummate a transaction between them.

It's clear from the way plaintiffs have pled this case and the way their experts have defined it that this has nothing to do with in-app purchases. So what this involves is how do you get the app onto your phone, how do you get your app onto the device. That's what this market is about.

THE COURT: Again, I've spent a lifetime with these reports.

MR. POMERANTZ: Okay. So let's get that -- I'm sorry.

THE COURT: So what is the IAP point?

MR. POMERANTZ: Let's go to the next market, because that's what's going on here. That's where this action's at.

THE COURT: All right.

MR. POMERANTZ: What our argument is in this is that the consumers do not have standing to bring a claim based on this market definition because they are too remote from -- they were not -- their injury does not arise in the market that the plaintiffs are alleging was where competition was suppressed.

So what's going on here in this market is that the --

THE COURT: Well, but the consumers say that they paid overcharges for IAPs and subscriptions --

MR. POMERANTZ: Yes, Your Honor.

THE COURT: -- because they bought them through the Play Store, so ...

MR. POMERANTZ: Right. That's the market you see at the bottom with the horizontal arrow. The developers are selling in-app purchases and subscriptions to the consumer, but that's not the market that they're alleging is restrained. What they're saying is we have to get our in-app billing services only from Google Play; we have to use Google Play billing. Instead, we'd rather be able to go to PayPal or to some other company that provides in-app billing services. And so those in-app billing services are a different market than

the market in which IAPs and subscriptions are sold.

And I'm not just making this up. This is exactly what Dr. Rysman and Dr. Singer say in their reports. There are two different markets here. One is the market to buy in-app billing services. That's the market they say was restrained by Google tying its billing system to its Play Store, to the store.

And so because the injury to the plaintiffs is not in the same market under ***American Ad Management***, which is a Ninth Circuit case, and ***Feitelson*** and a lot of other cases, ***DRAM***, the consumers do not have standing. We are not challenging whether the consumers have standing in the first market, and we're not challenging whether Epic and Match have standing in the second market, because they're the developers.

THE COURT: I know what you're challenging.

Okay. All right. Plaintiffs. Is it Ms. Weinstine (phonetic)?

MS. WEINSTEIN: Ms. Weinstein, yes. Thank you.

THE COURT: Weinstein, okay. Yes.

MS. WEINSTEIN: Your Honor, there is no legal or factual distinction that is relevant to this standing issue between initial app distribution, which Google concedes that consumers and states have standing to pursue damages on, and in-app downloads. The critical inquiry is not whether consumers are -- consumers are competitors in the relevant

market, it's the relationship between the defendant's harm and the injury to consumers. And as you point out, consumers purchase in-app downloads from Google. They pay an overcharge directly to Google. And the reason they are overcharged is because of Google's monopolization of app distribution. The foreclosure of competition in that market is what allows Google to tie billing services and require consumers to pay Google directly every time they make an in-app purchase.

A simple example illustrates the point. Let's say you want to download Monopoly from the Play Store. You pay $3.99 to Google directly. Any overcharge Google concedes can be collected by consumers as damages on that initial app download.

Now, let's say you want to play Monopoly Atlantic City addition. You download that as an in-app purchase. You pay Google directly for that in-app purchase $3.99, as well. Same as the initial app download. Consumers should be permitted and are under the law permitted to collect whatever overcharge they paid Google directly on that in-app purchase. "When a consumer is a direct purchaser of a monopolist and overpays that monopolist because of the monopolist's anti-competitive conduct, they have standing to pursue the full overcharge as damages." That's *Apple versus Pepper*, which addressed the exact industry at issue here.

Nothing in that analysis turned on whether Apple was

a retailer, as Google points out. What it turned on was whether there was any intermediary. There's no intermediary here between Google and the consumer in initial app downloads. Likewise, no intermediary in in-app downloads, and consumers have standing to pursue damages for both transactions.

THE COURT: Let me ask you this. Are you all going to -- are you all discussing stipulating to the relevant product markets for trial, or is this going to be -- is this going to be an issue in dispute?

MS. WEINSTEIN: I believe it will be an issue in dispute, though if Google would agree to our relevant product markets, I think we could resolve it.

Google defines a market where in-app downloads and app distribution, initial app downloads, are the same. Dr. Tucker says that our distinction between those two are superficial. So under Google's interpretation of the market, we have standing to pursue damages for in-app downloads. This is a reason why there's no case that says you have to do a fullblown market definition to determine standing.

THE COURT: Well, let me just jump in.

So what I'm thinking is this might also be something I need to take a look at once I see the evidence. If you all were in full agreement on what the potential relevant product markets are, I might be able to kind of take it from there, but if you're going to fight about what the markets are, I'm

going to need to hear the facts, and I think that might actually have a big impact on this issue.

MS. WEINSTEIN: Yes. As Your Honor points out, there's a factual dispute over market definitions.

THE COURT: I thougt -- okay. I thought you --

MS. WEINSTEIN: Thank you, Your Honor.

THE COURT: I hadn't heard that before. So this is going to be a big issue.

MS. WEINSTEIN: We agree that there's a disagreement.

MR. POMERANTZ: We agree to disagree on that point.

But Your Honor, what we're seeking in this motion is that under their defined market, the consumers do not have standing. If they want to concede our market, we'll withdraw it as --

THE COURT: Well, there is also the issue of proof at trial, and I'm not going to start closing doors until they've had an opportunity to -- if the relevant markets are in dispute -- look, they don't have to have completely 100 percent rock solid. They have to have enough to make it past pleadings issues. And so they don't have to have a fully concrete specific and perfected definition of relevant market. There are facts that will come up for trial, the issues that have to be decided. So, I mean, I'm kind of inclined, and I may just have to wait a little bit and see what you all are

going to do at trial before I pull the trigger on this.

MS. WEINSTEIN: Yes, Your Honor.

THE COURT: It doesn't mean --

MR. POMERANTZ: May I give you one --

THE COURT: Doesn't mean you're going to win or lose. I just don't know yet. Okay?

MS. WEINSTEIN: Understood, Your Honor.

THE COURT: Yeah. Go ahead, Mr. Pomerantz.

MR. POMERANTZ: So if Your Honor would go back and look at what Dr. Singer said in the exhibits that we attached to our motion and compare it to the argument that counsel just made, they're night and day. What Dr. Singer said is what we are arguing, that there are -- the market is just described just the way I outlined it in that pictorial tab 13.

Apple versus Pepper, Your Honor, it's really important to see the difference between our case and *Apple versus Pepper*. So in *Apple versus Pepper*, three to four times Justice Kavanaugh cites the way the parties define the market there, and they did define it the way that counsel describes. In that case, they said that the consumer was buying directly from Apple, the Apple App Store. That is not what they chose to do here. They chose instead to say that the consumer is buying from the developer. That's a -- and that was their choice.

I'll tell you why they made that choice. Epic filed

the first complaint, and they wanted to have a tying claim. And in order to have a tying claim, you can't have the consumers buying directly from Google. So Epic alleged that the consumer buys from the developer, and the developer goes, gets in-app billing services from in-app billing service providers. So they made a choice. The states, the consumers, Match, they all agreed with Epic's market definition. And while that does work for Epic and that does work for Match, it does not as a matter of law work for the consumers, because their injury is in a different market as they've defined it.

The sale of IAPs and subscriptions from the developer to the consumer is not the market that they alleged was supp -- competition was suppressed. That's the in-app billing service market.

So that's a pure question of law, because they chose how to define the market, and having defined it that way, the consumers can't bring a claim based on that second market.

THE COURT: All right.

MS. WEINSTEIN: May I just respond briefly?

THE COURT: Yes, just very briefly.

MS. WEINSTEIN: It is not correct that our case -- that we say that we buy directly from developers. We buy directly from the Play Store, and there's nothing in Dr. Singer or Rysman's reports that say that consumers are not participants in this market. That's just a fiction.

Consumers pay Google directly for in-app purchases under ***Apple versus Pepper***, ***Ad Management***, ***Glen Holly***, a whole series of cases we have standing to pursue damages for that overcharge paid directly to monopolist.

Thank you, Your Honor.

THE COURT: Okay. All right.

MR. POMERANTZ: Your Honor, just so that it was clear what Dr. Singer said, I put a box at the bottom of my chart, my little pictorial, that says crystal clear what he said under oath, and it is not what counsel just said.

THE COURT: All right. That's submitted.

And last one. Now, the time claims.

MR. POMERANTZ: So Your Honor --

THE COURT: Google and Google Play billing not being sufficiently distinct as products to be subjected to tying. Go ahead.

MR. POMERANTZ: So after we filed our brief, the Ninth Circuit issued its decision in ***Epic versus Apple***. And so that decision makes clear one of our arguments, which is that the per se portion of the tying claim cannot stand.

THE COURT: Can I read to you my quote from ***Epic***?

MR. POMERANTZ: Yeah.

THE COURT: Here's the quote, which is on page 996. Quote: "Here, the district court found that there was no tie because app distribution and IAP are not separate products.

We base this finding on four rationales -- each of which is either clearly erroneous or incorrect as a matter of law," closed quote.

So ...

MR. POMERANTZ: Right. So --

THE COURT: I don't think *Epic* is a huge help for you.

MR. POMERANTZ: No, no. Your Honor, I agree with you except for one aspect of it, except for one aspect. The Court made crystal clear that there's no per se claim. That's behind Tab 17. No, I'm sorry, that's wrong.

THE COURT: Yeah, but that's all premised on your belief that there's no coercion behind the tying, and that's a fact issue.

MR. POMERANTZ: No, no, no.

THE COURT: I can't decide now.

MR. POMERANTZ: Your Honor, it's Tab 23. If you look at Tab 23, and what the Ninth Circuit said there is: "We join the D.C. Circuit in holding that per se combination is inappropriate for ties involving software that serves as a platform for third-party applications. It is only after considerable experience with certain business relations that courts classify them as per se."

So what we're saying here, Your Honor, is, you know, most of the battle in our opening brief was about tying writ

large, whether it was rule of reason or per se. What *Epic* says, *Epic versus Apple* says, is it can't be per se as a matter of law. It can't be per se. They allege both per se and rule of reason. So per se has to go out under *Epic versus Apple*.

THE COURT: You know, you're saying that *Epic* says per se, it can't be per se. It's not saying that. It's just saying act with caution and humility until there's a clear record about the industry.

MR. POMERANTZ: I don't believe --

THE COURT: Okay? So maybe this clear record is here now today.

MR. POMERANTZ: I would ask Your Honor --

THE COURT: This is not the first case. This is now the second case.

MR. POMERANTZ: I would ask Your Honor to --

THE COURT: This is now the same type of conduct in the second case. At least that's the way plaintiffs allege it.

MR. POMERANTZ: If Your Honor --

THE COURT: There is no per se barrier in *Epic* that forevermore this cannot be considered per se. I don't think it's a fair reading of what the court said. It said let's take baby steps. I'll put it informally. That's what it said. And I think you're asking to say maybe it just hit the

wall, but there's no wall in *Epic*.

MR. POMERANTZ: Your Honor, I would just urge Your Honor to spend one more time reading page 997.

As to the rule of reason claim, what happened in *Epic* is that Epic never mention the *Rick-Mik* case. It's another Ninth Circuit case. They didn't overrule it. They didn't even mention it.

So we're now sitting there with *Epic v. Apple* and *Rick-Mik*. We are making our argument, because at some point the Ninth Circuit's going to have to decide whether *Rick-Mik* is still good law in view of *Epic*. They say it's limited to franchise cases. I don't think that's a fair reading of it. Yes, it was a franchise case, but the reasoning doesn't depend on whether it's a franchise or not.

So what we're left with is that at some point Your Honor and the Ninth Circuit will have to think about whether *Epic v. Apple* is the law in the Ninth Circuit or *Rick-Mik* is the law in the Ninth Circuit. And we are simply preserving that issue. If Your Honor disagrees with us it will be teed up to the Ninth Circuit.

THE COURT: All right. Plaintiff.

MR. REITER: Your Honor, I'll be brief. Joseph Reiter for the Match plaintiffs. I'll address the per se argument first, and I have two responses to that.

The first is that this argument was not made in

Google's opening brief, it was made for the first time in their reply brief. You don't have a developed record or argument on this issue, and for that reason it should not be decided now.

Second --

THE COURT: Well, I'm inclined to deny, and you're pulling the rug out from under me by saying wait. Do you want me to wait? What do you want me to wait on?

MR. REITER: I -- Your Honor, there's no need --

THE COURT: Did you not hear the quote I read from *Epic*? So if you want me to wait, I'll wait. Okay? And if you think the issue's not ripe, then what do you want to do with it?

MR. REITER: Your Honor, I believe you can deny the argument now for the reason you mention.

If you continue reading the next paragraph in the *Epic* decision, the Ninth Circuit made clear that its finding in that case was based on the record. And if there's a consistent theme from our arguments today, it is that a determination of whether the per se or the rule of reason standard applies depends on the facts that will be presented at trial.

THE COURT: Well, look, we're getting close to a giant trial. Okay? We can't -- I'm not going to get hung up on order of argument. So do you want to just withdraw your

suggestion that this isn't ripe?

MR. REITER: Yes, Your Honor.

THE COURT: Okay. We just have to get this thing done. I have plenty of ammunition. Is there anything you want to add that you think you did not have a chance to add?

MR. REITER: No, Your Honor.

THE COURT: Okay. Because the plaintiff certainly had -- I mean, the defendant certainly had its opportunity.

Okay. All right. Anything else to add on that?

MR. POMERANTZ: No, Your Honor.

THE COURT: Okay. That will be under submission.

All right. Now, let's talk about what's going to happen. I had hoped to have more specifics, and this is with respect to trial planning, more specifics from you all about what exactly we're going to do. You keep saying all jury issue -- all issues subject to jury trial will be tried to a jury. I need more than that.

I mean, here's what I want you to do in short order. Go through all of the complaints and just make a list of what we're going to try on November 6th. Okay? What are, in your view, your joint agreement on these are the jury issues that we're going to ask the jury to resolve on November 6th. Okay? Now, let's just start with that, because I'm unclear about the specifics. I need that.

So, now, having said that, I really -- there was

some thoughts about, you know, having a jury basically be on tap for months, and months, and months on end as we go through, you know, bifurcations and phases. I don't want to do that. We can't -- it's not realistic. We can't do that. Okay? I can't -- this is not a grand jury that I can have for six months, you know, warehoused. We can't do that.

So the goal is to have all the jury trials done at once, damages and liability all at the same time, and I need you to spell out specifically what those claims will be. All right? Just each case cite and say from the consumers' complaint, here are the ones from the Epic complaint, from Match, from the states, here's what we're going to do.

Counterclaims. Okay, we're going to, you know, we'll talk about counterclaims later, but just put them in for now. You all are coming back I think later for the counterclaims.

All right. So let's do that.

Now, I don't know what to do, let's just talk out loud among friends here about the consumers. Okay? I just, I don't -- I can't have two separate trials on the same antitrust claims. We can't do that. That's just a recipe for disaster. Okay? So I understand the attraction of saying, oh, we'll just wait on the consumer claim and we'll do it later, which you agree with. What does that mean? I mean, I can't -- these allegations are almost completely coterminous

substantively, so I can't have one trial where a jury decides whether Google violated Section 2 in its operation of the Play Store and then have another trial three months later or five months later on exactly the same issue as if the first one never happened. We can't do that.

MR. POMERANTZ: So, Your Honor, I understand the situation you're in, and we asked for a stay and didn't get that from Your Honor to move all the cases back, so we went to the Ninth Circuit and we asked to expedite the appeal.

THE COURT: I know that. It's going to be heard in a, you know, couple of weeks.

MR. POMERANTZ: In September. It's going to be heard in September.

THE COURT: September 11th, yes.

MR. POMERANTZ: And so one thing Your Honor -- we hope the Ninth Circuit will rule as quickly as it can, we really do. We don't control, you don't control the Ninth Circuit.

We have another issue that I wanted to raise, and it's somewhat related, which is Google is a party to a case in D.C. Your Honor's family with. The DOJ is suing.

THE COURT: That's also in September, right?

MR. POMERANTZ: Yes. And what happened is last time we were in front of Your Honor, it -- we understood it was going to be five or six weeks. So it would end sometime in

the middle of October.

Judge Mehta has now allowed 200 hours of, as I understand it --

THE COURT: Per side or total? Total.

MR. POMERANTZ: And so what that means is it pushes that trial into the middle of November.

So one of the thing -- I -- you know, I'm bringing it up in part because we're going to have -- we could have witness availability issues starting November 6th.

THE COURT: So you're going to do a hundred hours each in --

MR. POMERANTZ: Not here.

THE COURT: No, in D.C., starting --

MR. POMERANTZ: I don't think it's a hundred hours each, but I think it's a total of 200.

THE COURT: A hundred hours per side, right?

MR. POMERANTZ: No, I think he's actually giving the plaintiffs more because the states -- I'm not in that case, Your Honor, but I think because the DOJ and states have different theories of the case --

THE COURT: Plaintiffs are getting more time?

MR. POMERANTZ: Yes, I think that's what's going on.

THE COURT: Is anybody here on the D.C. case?

MR. GLACKIN: That's about right, Your Honor. I think that -- I'm sorry, Brendan Glackin on behalf of the

state attorneys general.

My recollection is that the plaintiffs in that case are getting 135 hours total, and then Google is getting 65 hours. And the time as between the state AGs in that case and the federal government is split, but most of the time I think going to the Feds and then some amount going to the states. I don't have that number at the top of my --

THE COURT: When does that trial start?

MR. POMERANTZ: September 11th or 12th.

MR. GLACKIN: First week -- second week of September.

MR. POMERANTZ: And so, Your Honor, one thing we could consider is --

THE COURT: Well, that's going to go through December then, right? I mean ...

MR. POMERANTZ: It could. We don't -- it could.

THE COURT: Does Judge Mehta do five days a week 9:00 to 5:00? Do you know how --

MR. GLACKIN: I don't know.

THE COURT: We do 9:00 to 2:00 four days a week. So if I did a hundred hours, that's going to go for three months.

MR. GLACKIN: I don't know how Judge Mehta does trial.

MR. BORNSTEIN: Gary Bornstein.

Your Honor, Judge Mehta's order, which we can try

and find for Your Honor from June 30th, about a month ago, actually spells out the days --

THE COURT: Oh --

MR. BORNSTEIN: -- in which he will be sitting, the days he won't be sitting, and his projection at least is that the trial will run, as Mr. Pomerantz said, through about November 15th.

THE COURT: So the expectation, it will be done around the second week of November.

MR. BORNSTEIN: That's what's in the Court's order, yes.

THE COURT: And Mr. Pomerantz, you and your team are not on deck in that trial?

MR. POMERANTZ: No, I'm not, Your Honor.

THE COURT: Okay. So there's no issue with counsel.

MR. POMERANTZ: It's no issue with counsel, Your Honor, not with outside counsel. There are some overlap on the inside, but not on the outside.

THE COURT: I understand. For the trial lawyers there's no issue here.

MR. POMERANTZ: That's correct.

THE COURT: So you're just worried about what?

MR. POMERANTZ: Well, I'm worried about witness availability, because to the extent that the plaintiffs want to call Google witnesses in their case and those witnesses are

involved and testify --

THE COURT: We're going to have an overlap of one week, because this trial starts --

MR. POMERANTZ: Two weeks.

THE COURT: Now, this trial starts November 6th, doesn't it?

MR. POMERANTZ: Yes, Your Honor.

THE COURT: And the projected the 15th, that's basically seven trial days.

MR. POMERANTZ: Yeah, it's -- there is an issue there. And first of all, I just want to alert --

THE COURT: Well, I don't know what -- I don't see the issue. They're going to have -- that's the tail end of the trial in D.C. will be just when we're starting. I can't imagine there will ever be a situation where even if some witness on your end needed to be in Washington on November 11th and needed to be here, we'll just pass the witness until later in our case.

MR. POMERANTZ: Okay, Your Honor.

THE COURT: You're going to get -- I'm going to break all my personal and practice rules, and you're going to get a large chunk of time. So you're going to have plenty of time. I suspect I'll probably do something, you know, close to 75, hundred hours per side, and I'm not going to -- going to let you allocate it. I don't want to be too intrusive. I

do think some parity is important between defense and --

MR. POMERANTZ: We've actually had a proposal to Your Honor. It's in Docket 165.

THE COURT: Oh, trial statement?

MR. POMERANTZ: Yeah. And we proposed I think a total of a hundred hours combined, and --

THE COURT: Oh, 50 hours per side.

MR. POMERANTZ: And we would take 50. I think that's --

MR. GLACKIN: That is what we proposed, Your Honor. We heard your prior guidance about --

THE COURT: Fifty hours per side.

MR. GLACKIN: Yes.

THE COURT: Well, okay. So that's -- if we start November 6th and we do my typical trial day, you know, you get maybe -- with breaks and everything you'll get maybe, if you're fortunate, four and a half to five hours of testimony per day four days a week. So let's say you're getting 20 hours per week. That's a five-week trial. That means through Thanksgiving and probably closing right before the, you know, holiday break at the end of the year.

MR. POMERANTZ: I think we thought we'd be closing sometime in the middle of December, middle of December.

MR. GLACKIN: Yeah, when we mapped it out, we thought we could get it to the jury by the end of the second

week of December.

THE COURT: All right. They're going to have to have a good long time to deliberate. Okay? I mean, getting it to the jury on the 23rd or something is not ideal. And look, it's happened. If we need to do it, we'll do it. It's not in my view an impediment, I just want to be somewhat thoughtful about the jury, that's all.

MR. POMERANTZ: Your Honor, to go back, then, to the question you raised, which is what do we do about the consumer class. So the Ninth Circuit --

THE COURT: Before we do that, all right, so I don't see a timing issue with DC. I just don't. Okay?

Now, here is the concern. Let me just be crystal clear. I just cannot have two separate jurors addressing the same liability issues. It can't happen. Maybe there are all sorts of, you know, interesting niches of the law with respect to preclusion. That in itself would be a massive sideshow, you know, whether somebody's precluded based on a jury finding. Those are not easy questions. I have wrestled with them. You may have, as well. It's rather complicated. And then you're trying -- you know, if Google loses, it's not clear to me, you know, what the preclusive effect is going to be in round two. And if Google wins, same issue.

So what's the solution?

MR. POMERANTZ: Well, Your Honor, you know, the

Ninth Circuit --

THE COURT: I have one in mind, but I want to hear yours first.

MR. POMERANTZ: I hope the one you have in mind is not to have the consumer class be part of the trial in November, because the Ninth Circuit has indicated to us --

THE COURT: No, no. Let's just assume the consumers aren't there. I do have an idea of how I might --

MR. POMERANTZ: Then I definitely --

THE COURT: Do you have any idea?

MR. POMERANTZ: No. I mean, no, other than ideas that we've proposed previously that Your Honor has rejected.

THE COURT: Well, here's my thought. I'm just thinking out loud, now. I have tried consumer class actions as a lawyer. I've certainly presided over a number of them here as a judge. They're not -- aside from literally one jury instruction in the beginning of the case saying this is a class action, it never comes up again. It never comes up again. Okay? So, in terms of liability at least. Now, damages maybe. But in terms of the liability, it never -- what's true for one member of the class if you win is true for all 21 million members of the class.

So why not think about trying the whole case with just the consumer individuals, okay. Consumers would then, if they prevailed we would just have a damages hearing. You

know, see the class, you know, if the class is certified, the class is still standing, we just have a damages hearing based on what would be due to the consumer class.

Now, you know, this is not -- this is just thinking off the top of my head here. There will be some complications with, you know, making sure there aren't duplicative verdicts and recovery and so on, so there might, you know, have to have a little posttrial action. But, you know, and if Google wins, then that's it. Consumer class, you know, if the individuals lose, then the classes lose and the consumers would be bound by that.

I haven't fully thought through the whole absent class member thing. I don't think it's an issue. I'd like to think about that and get your advise on it.

So my sense is you would just live or die by what happens to the individuals on November 6th.

MS. GIULIANELLI: Your Honor, I think as a practical matter -- oh, Karma Giulianelli from the consumer class.

As a practical matter, I think that Your Honor's correct, and that's very I think similar to what we are planning on doing, which is having an individual at the trial in November, and then we'll see what the Ninth Circuit does.

Now, if the Ninth Circuit affirms before November, I think we could -- we'd have to give the appropriate amount of time for class notice to be done, but I hope that we could do

that expeditiously, probably not by November 6th, but perhaps --

THE COURT: I'm not sure that will work. So let's -- it will take them at least, you know, we should assume at least a week.

MS. GIULIANELLI: Yeah.

THE COURT: And that's not highly unrealistic based on my own limited experience of sitting on this circuit, but let's say at least a week, but maybe it takes more. And we certainly, you know, we're not rushing anyone, judges. I'm certainly not rushing anyone.

So the notice, though, I mean, how long would you contemplate the notice period being?

MS. GIULIANELLI: I think that it could be done pretty quickly, within a couple of months, but I think that Your Honor's suggestion about dealing with the consumer-specific damages later could work, and we indeed plan to have individuals, not the class, at the November trial.

THE COURT: Well, that's almost always the case. It's always just the named plaintiffs even if the class is at the trial.

Okay. Well, so I'm not going to lock anybody in, but you're tentatively comfortable with that Ms. Giulianelli?

MS. GIULIANELLI: Correct.

MR. POMERANTZ: I'm not, but I -- we need to talk to

our client.

But I think what one of the problems here, and let me start with the states. The states don't have to certify a class, but they will have to prove injury and damages on an individual basis, and what they say they're going to do is they're going to offer Dr. Singer's analysis to prove it.

THE COURT: Okay. Look, before we do that, let's just talk about, so the consumers are willing to go forward. Just finish that thought.

MR. POMERANTZ: I can't agree to that without consulting with my client, because as Your Honor says, there's a lot of, you know, preclusion issues that one would have to think about, and I just can't agree to that.

THE COURT: Well, no. This would eliminate the preclusion issues. It's all going to be done -- this is basically just agreeing everyone will treat this one trial as a proxy for a class if there is a class. If there's no class it doesn't matter.

MR. POMERANTZ: No, but if they --

THE COURT: You're done. But if there is a class, and it doesn't get resolved or notice isn't given or something, we'll have to deal with notice separately. But, you know, you -- they would live or die by the verdict for the class.

MR. POMERANTZ: Right. But if we have the

opportunity -- let's say we lose the first trial. If we are not precluded from relitigating that issue with the consumer class because they weren't there -- and again, as Your Honor said, we'll have to brief, if we ever got to that point, preclusive effect. But if you're asking me to give up that point right now, I don't have the authority to do it and I can't do that.

THE COURT: Well, it's not -- I'm not asking you to give up anything. I'm asking to just, we need a way of solving the problem. Now, I can't imagine why you -- if you lose the first trial, you understand that you're not getting a complete redo at a second trial. I hope you understand that. You're not just walking into the second trial as if the first trial never happened. That's just not going to happen.

MR. POMERANTZ: And if we lose --

THE COURT: So you may be going in with not just having one arm tied behind your back, but, you know, all but a single digit tied behind your back.

MR. POMERANTZ: And I take it what Ms. Giulianelli is saying is that if we win that first trial, we're going to hear from the consumer class.

THE COURT: Then they're done. They're not going to come back either and get that. It's bilateral. Okay? That's what I'm proposing, it's bilateral. You're both going to be bound.

MS. GIULIANELLI: Your Honor, the one issue is we do need to make sure in order to bind the class, that the class has adequate notice and due process --

THE COURT: Oh, of course. That goes without saying.

SPEAKER: -- before that.

THE COURT: And my job is as the protector of the absent class members. I do that diligently and I do that faithfully. So don't worry about that. I agree. We're not -- and if that means we start a couple weeks later, if we have everything else lined up that probably will be just fine. Okay? So we're going to -- no one's going to get railroaded on class notice, absolutely not.

MR. POMERANTZ: Your Honor, I think --

THE COURT: So now you understand it's bilateral, all right, it's a one and done with some --

MR. POMERANTZ: I will discuss it with my client.

THE COURT: -- nuts and bolts common sense agreements.

MR. POMERANTZ: Your Honor, I understand you're not asking me today to commit my client to anything. I would have to talk to my client about this.

THE COURT: No, but you are counsel, and that is ...

MR. POMERANTZ: I will advise them. I will advise them. That's all I do.

But I would say that to me, one of the risks here is it's treating the trial as if the class had been certified.

THE COURT: No, it's not.

MR. POMERANTZ: It is, because you're trying to get us both bound by --

THE COURT: No, Mr. Pomerantz, not at all. That is completely wrong. It does not presume anything about the existence of the class. It is completely agnostic about the existence of a class. All you are doing is both the class and, if there is one, and you, Google, are going to agree to be bound by the outcome. That's it. It doesn't matter one way or the other whether a class is certified or not. Nothing is presumed. And in fact, if anything, the benefit of the doubt will go to you, because the jury will never even hear, if the Ninth Circuit hasn't acted yet, will never even hear that there is a potential class. They won't get a word about that.

MR. POMERANTZ: All right. And just so I under --

THE COURT: And you will come out ahead arguably.

MR. POMERANTZ: And just is it your view, then, that if we go to trial in that way, notwithstanding the fact that the Ninth Circuit hasn't ruled, that Dr. Singer's approach to damage -- injury and damages will be admitted in front of the jury while the Ninth Circuit is considering it?

THE COURT: I have the merits Daubert motions before

me right now. I haven't ruled on the merits Daubert motions with respect to that issue yet. Okay?

MR. POMERANTZ: All right. Thank you, Judge. I understand.

THE COURT: So one -- let's beat one mule at a time. All right?

MR. POMERANTZ: I will discuss it with my client, Your Honor.

THE COURT: That's all I'm asking.

MR. POMERANTZ: Okay. I will discuss it.

THE COURT: Now, does everybody on the plaintiffs' side understand what I'm saying? Is there anybody on the plaintiffs' side that has any heartburn about this possibility? It's just a possibility at this point.

Let me just say this. If we don't do this, I don't know what we're going to do. I don't know what we're -- what are we going to do if we don't do this, Ms. Giulianelli?

MS. GIULIANELLI: Well, I think there is a conundrum, so I think as long as the class is not bound before any notice goes out or --

THE COURT: Of course --

MS. GIULIANELLI: -- as a matter of due process that --

THE COURT: Absolutely, yes. Don't be troubled about that. Nobody's going to be bound without everything

that Rule 23 guarantees them and my personal vigilance, and I -- you can ask around. I am very vigilant about absent class members.

Now, but what is it? What are we going to do if this doesn't work out? I'm looking at you, yes.

MS. GIULIANELLI: For instance, if the Ninth Circuit decertifies?

THE COURT: No, no, no. If we do not have a consensus about what happens on November 6th and there is no decision beforehand, what are we going to do?

MS. GIULIANELLI: Well, I suppose what Your Honor clearly does not want, the other possibility would be for consumers, if this trial goes forward with everybody else, the Ninth Circuit affirms later, and then the consumers would have a right to a trial --

THE COURT: I cannot see how that works. I just cannot see how you can have a separate trial without getting into just a hopelessly complicated thicket of preclusion issues, which are terribly complicated. I don't know if you've ever dealt with them. I guarantee you whoever's on the losing end of the verdict is going to have a million reasons why not a single line in the verdict form is going to stick to them. Okay? And to go through all of that is just a mountain of work.

MR. POMERANTZ: Your Honor --

THE COURT: This verdict form is going to be complicated.

MR. POMERANTZ: As Ms. Giulianelli didn't have an answer you probably wanted, I'll give you one that would work, but you've turned it down before, which is if -- now that we have the Ninth Circuit hearing it in September, if the trial instead went the first quarter of 2024, all these problems would probably be resolved, because we would have clear guidance from the Ninth Circuit.

THE COURT: No, I understand that, and I'm really hoping to avoid that, because, you know, these complaints, the first one was filed in 2020. Okay? I mean, it's just we do have to get this done. If it's a matter of four months, who knows, maybe that's not so bad.

MR. POMERANTZ: We will be ready on November 6th if that's what Your Honor wants, but now that we are where we are with the Ninth Circuit and the hearing date and the appeal, it -- you know, there is some merit to moving it to the first quarter of 2024.

THE COURT: I'm not going to do that new. I'm just not.

MR. GLACKIN: I don't think there's any guarantee that the Ninth Circuit is going to get anything done in time for the first quarter of 2024.

THE COURT: Well, they may be -- you may be --

MR. GLACKIN: I famously had an experience where the Ninth Circuit spent 18 months reviewing a preliminary injunction where, I mean, supposedly an urgent matter. So the Ninth Circuit could do it in two weeks, or the Ninth Circuit could do it in six months.

THE COURT: I understand.

Well, let's just at least have a dialogue on that first proposal, okay, just as backup, okay, to see how things go, and then I think we just have to get towards the end of September to see where we are before making -- don't stop trial prep. Nothing has been stayed, so be ready to go. Have everything ready to go.

Okay. Anything else for today, plaintiffs?

MR. GLACKIN: Your Honor, I just, I want to address one thing you brought up at the beginning, which is the figuring out which claims go to the jury and which claims go to the Court --

THE COURT: Yes.

MR. GLACKIN: -- and which issues within claims.

We have a process right now in place between the parties where we exchange both jury instructions and drafts of the pretrial statement. And I would imagine, or our plan had been to work this issue out through those exchanges of drafts so that when you get the final instructions and the final pretrial statement, it will be teed up to you in terms of

which claims go to the jury and what are the appropriate instructions on those claims and what disagreements are there, if any, in the instructions, and then in the pretrial statement you will have the list of claims and issues that go to Your Honor.

So we have a process in place for that right now that involves us exchanging drafts over the next three weeks.

THE COURT: Oh.

MR. GLACKIN: And I think tell get worked out.

THE COURT: Oh, are you say at the end of this you're going to have an exact roadmap of everything?

MR. GLACKIN: That's the goal.

I think by the time we have the -- I sort of personally view the final instructions to the Court and the final joint pretrial statement as kind of the point by which this has to be figured out.

THE COURT: All right. Y'all agree on the plaintiffs' side? Okay.

MR. POMERANTZ: Your Honor, Mr. Glackin and I actually talked about this last night, and so I think what, if I understand, give us until early September to get back to you, is that what you're saying?

MR. GLACKIN: I'm sorry. I mean, I think we have to give you a draft -- excuse me. I don't mean to talk to Mr. Pomerantz.

THE COURT: Well, let me ask you this. When you say three weeks, that's to get it to the defendant, or in three weeks you're going to be done?

MR. GLACKIN: Our first -- actually, our first exchange, the plaintiffs are due to give Google their draft instructions and their draft of the joint pretrial statement August 24th, I believe, which I think will have this information in it. And then there's a fairly rapid --

THE COURT: That's three weeks from today.

MR. GLACKIN: Right.

There's a fairly rapid back and forth of exchanges between the parties that follows that, so I don't have the final date. I believe the final -- I don't have the final dates in mind at the moment, but I think it all gets wrapped up sometime in --

THE COURT: I tell you what, why don't you just keep doing that. Okay? That sounds perfectly fine. I don't need to interfere with that. But I need your guarantee that as of the first week of October, I am going to be completely clear on what's being tried and what's not. All right? I don't -- I don't want to have someone come to me on October 15th and say, we're not really sure what the trial's going to look like because we can't agree on the following five claims are going to be tried or not. All right? So you need to -- I need to know with certainty, let's just say by the first Monday in

October that you all have this under control and I'm not going to be asked at the last minute to make all sorts of decisions about what the jury's actually going to be doing.

MR. GLACKIN: So understood, Your Honor, and we'll do that.

And apropos of the keeping the pretrial changes on track, I mean, there's -- we, the plaintiffs, had a suggestion that I previewed for Mr. Pomerantz, which is, you know, we had -- we thought it might be wise to put a control date on the calendar, a possible hearing in front of Your Honor sometime in September, so that if there are any issues with the pretrial exchanges we could present them, and if not -- hopefully there won't be.

THE COURT: Well, I tell you what, I cannot have you back on the -- so the counterclaims motion, I can't have you back that week. I need to have you back the next week. So how about I think that is -- is that September 6th?

MR. GLACKIN: Yes, Your Honor.

THE COURT: First Thursday?

Okay. So just September 6th. How about is that?

MR. GLACKIN: Terrific.

THE COURT: Will you know by then with some degree of certainty where you are?

MR. GLACKIN: I think so.

And then the -- I'm sorry to continue.

THE COURT: Wait just one second.

Oh, that's September 7th, sorry. September 7th, Thursday, yeah.

Okay. But I just need to know that you're going to have -- doesn't have to be completely carved in stone, but it's close to being carved in stone.

MR. GLACKIN: Then the one last --

THE COURT: We're agreed on that? That's going to be enough time?

MR. POMERANTZ: September 7th works for me, Your Honor.

THE COURT: Okay. But not just you can be here, but that we're going to have a deal on the table September 7th.

MR. GLACKIN: Yes. Or if --

THE COURT: Or you can tell me there are huge issues.

MR. GLACKIN: We're going to tell you there are problems.

THE COURT: Okay.

MR. GLACKIN: Or there won't be.

MR. POMERANTZ: That's fine with us, Your Honor.

THE COURT: Okay. Good.

MR. GLACKIN: And then I am sorry to be the one continuing to burden Your Honor, but --

THE COURT: You're not burdening me. We've got to

get into these things. I'm going to talk to you a little about a couple other details, too, but go ahead.

MR. GLACKIN: Well, the other issue we wanted to raise, not on the merits but just as a process matter, is the question of the sanction related to the chats motion that you already heard. When you issued your order on that, you said that you would determine the appropriate sanction closer to trial. And so we just wanted to bump that issue, as it were --

THE COURT: Well, when do you want to raise this?

MR. GLACKIN: Well, I mean we -- one idea we had was to raise it on the September 7th date, to use that date also to decide the chats issue.

THE COURT: That might be a little early and a little much for that day.

First of all, I mean, you need to tell Google what you're thinking, and they need to have an opportunity to respond.

MR. GLACKIN: We would be fine responding -- we would be fine doing it later, Your Honor. We just wanted to raise it.

MR. POMERANTZ: And, Your Honor, if I -- I'll discuss --

THE COURT: Can I ask you before we do that, are you going to ask for preclusion sanctions? Is that -- if it's

just money~-- the money part got done, right? Didn't the money part --

MR. GLACKIN: Your Honor, I think when last we left our hero, so to speak, we were talking about a possible instruction. And so --

THE COURT: Oh, right.

Okay. All right. So that's going to be it, then, just the possibility of an adverse inference instruction?

MR. GLACKIN: Correct, Your Honor.

THE COURT: Oh, okay. Well, that's relatively straightforward.

MR. POMERANTZ: And Your Honor, well, so one of the things we were thinking about was Your Honor had indicated that you were going to likely let them put on some evidence, not a lot, but some evidence to the jury about --

THE COURT: Yes.

MR. POMERANTZ: -- this issue.

THE COURT: Now, the only question is am I going to take the next step and say you are free to draw an adverse inference from that.

MR. POMERANTZ: And so one suggestion we would have is that, actually consistent with some of the things you were dealing with on summary judgment, perhaps the issue of whether you're going to issue an instruction, if so, what it should be, should it wait seeing how the evidence is. You combine it

with what you already know from the proceeding, and then you decide whether you're going to structure the jury, and if so, what that instruction should be, so that while we could each propose some instructions to Your Honor, your decision about what the instruction should be could be made nearer to the end of trial like in a lot of other decisions, you wait to see what the evidence is and you --

THE COURT: That's not a bad idea.

MR. GLACKIN: I do think -- let me put it this way. I think for planning purposes in terms of getting ready for the trial, it would be helpful to have at least some additional information about how this is going to be addressed even if a final decision hasn't been made.

THE COURT: Well, here's the information. You won your sanctions motion. Okay. So the only issue is now am I going to give an adverse instruction. You can certainly raise it. To me, I'm just, the way I would see it -- you're much deeper in the case than I am, so you may know better. But the only question in my mind now is if the adverse instruction is going to await showing at trial, am I just going to have three people talk about it, or am I going to do 30 people. That to me -- in other words, do I have to prove it up as if it were an issue in the case, or can I do proof light.

MR. GLACKIN: That's the piece --

THE COURT: And Mr. Pomerantz is I think not

unreasonably suggesting, let's see.

Now remember, the reason I said that, you know, I do a lot of orders. Remind me if I'm not recalling my own order correctly. But the reason I said that is I'm not entirely sure -- it was egregious; I found that. It was intentional; I found that. It's not entirely clear to me that you got truly stiffed on essential things given the mountain of other evidence. So I just wanted to see everything so I could be proportionate, as I am required to do. That was why I think there's some appeal to seeing all the evidence. It will help me calibrate the extent to which this intentional default by Google hurt you. You see what I'm saying?

MR. GLACKIN: I see that, Your Honor.

The one thing I have to throw into the mix is that your order did contemplate, and it did happen, in that there was additional discovery taken, some of it related to this issue. And I'm -- you know, in terms of we're going to want to present what we've now learned from that discovery to Your Honor in terms of making the argument about what exactly the inference should say and what we have to prove and don't prove. Doing that during the trial might be -- I mean, might be an unnecessary lift, so to speak. We don't need to resolve this now. We don't need to resolve it in September. I do think it would be prudent to have some kind of a process by which we gin this up.

THE COURT: Well, why don't you two just see what you can think. Okay? You can talk about it.

Come up, Mr. Bornstein.

MR. BORNSTEIN: If I may be heard briefly, Gary Bornstein, Your Honor.

Two things on that.

One is if we do reserve this for trial, it does change the nature of the trial presentation that we had. We were all here on January, we took a lot of Your Honor's time, we had witnesses. We've already proven the prejudice, we've already proven the intent, Your Honor has found that.

THE COURT: Yeah, but I'm just trying to scale the remedy, that's all.

MR. BORNSTEIN: Exactly. I mean, the issue you left was proportionality. We are prepared to make a showing as Your Honor contemplated through further proceedings of what the proportionate remedy should be. That's not something we think we ought to have to do through witnesses in front of the jury, it's a decision for Your Honor on how to do that, and we can --

THE COURT: Well, you would make a proffer, in other words, basically.

MR. BORNSTEIN: That's correct, Your Honor, and we can take advantage of the additional material that we've gotten and additional facts that we've learned.

And I do want to just put out there for Your Honor's awareness, one of the things that we think would be appropriate, subject to Your Honor's decision of course, is to have this be part of the preliminary instructions to the jury rather than save it to the end.

THE COURT: Adverse inference?

MR. BORNSTEIN: Well, no. An instruction, Your Honor, about what happened to certain documents and why they're not here.

THE COURT: Yeah.

MR. BORNSTEIN: So that --

THE COURT: That we'll save for later.

Look, talk about a proffer. If we can do it that way, fine. Just -- but just use the benchmark. I'm just looking for a way to be proportionate. All right? There will be something. I don't know what it will be. You've already got your fees worked out, right? That's all done, okay. So we need to figure out what the next part will be. Okay?

Now, but no matter what, you can certainly bring it up at trial. Whether you get an instruction or not, you can examine witnesses about it. That's perfectly fair. And, you know, you can argue it in closing. Now, we're just talking about the next step.

Now, before we go I just wanted to raise a couple things, because this is going to be a massive undertaking.

The first is cameras in the courtroom.

Now, the district courts as a whole, it is not my preference or the preference of many other individual district judges, but the district courts as a whole are not permitting realtime broadcasts of proceedings. I have strong feelings about that, but that is the rule, okay, and I can't change that rule.

We do have this so-called pilot program, even though it's been around for a while, where the proceedings are recorded. I have an opportunity to look at them, and then they're, through this very elaborate process, uploaded out of the national office in D.C. to be available in kind of a YouTube-like format. I don't think it's actually YouTube, but it's close. It's completely different from the live realtime YouTube platform-based broadcasting of circuit arugments. We don't do that because that is the will, I am told, of the district judges as a whole.

So part of this pilot program makes the situation even more difficult by saying any one of you can veto this. It just takes one person to say, "no".

Now, I think this case is of great interest to a lot of people. I think the cameras, I have done it once before. I had some parties who weren't put off, as I don't think you should be by the idea of having these tapes. And in fact it was an MDL antitrust trial just like this one, MDL antitrust

price fixing.

And once the cameras are here you don't even see them. There's a little camera here. You just forget about it. The jury's obviously never featured, I'm never featured, nobody will see the jury. It will just be what happens here.

So I need you to think about that, because if we do do it, I have to do some technical work. I -- it's totally up to you, and if someone says "no," that's the end of the matter and I forget about it and it's perfectly fine. But I do think you should think about it, okay, because this is the kind of case that is getting a lot of attention these days, as you know probably better than I do, and it would be nice to let people have access to it who can't necessarily be in the courtroom.

So that's number one.

So tell me on September 7th. Okay? You just file something. You don't have to tell me in open court, you just file.

The second thing is we're doing this written questionnaire screening of potential jurors. Typically I and most judges in this district have kind of a rough formula. It's not always true, but it has been more often than not. You lose about a juror every week to 10 days of trial time. Just things happen. People get sick, something happens. So we need a minimum of six, which I prefer not to hit the

minimum, but if we do have to, we can.

But with a trial of this length, particularly towards the end of the year if that's how we end up going, I think we're going to have to call in a ton of people, because I'm probably going to end up sitting 12, okay, just to make sure. Because if you take 12 and amortize them over the life of the trial, you know, we'll probably end up with eight. I hope not, but that could be the way it is.

MR. POMERANTZ: And, Your Honor, just so I understand, would -- whoever remains at the end, they would all deliberate?

THE COURT: Yes, yeah. There are no alternates. You know, civil side no alternates. You seat 12. You have to have at least six. Now, you all can stipulate to less than that, but we don't have to deal with that right now. Statutory minimum is six unless you all agree to go below ot.

But in any event, what I'm saying is we're going to have this written questionnaire. Now, it's -- we're going to have to send out probably to a couple hundred people. It really -- the questionnaire was really the fruit of the COVID era trying to screen people for health issues and vaccination status and so on, so that we didn't become a super-spreader site by having jury trials.

Now, the national COVID emergency has been terminated by the federal government, California state has

terminated its COVID manager. We, as a court, have terminated it for the most part.

So here's the issue, two issues.

One is typically this questionnaire is very nuts and bolts about demographics and health status and maybe one or two questions about the case. In this kind of case it might be, have you ever worked for the defendant, or, you know, have you ever worked for one of the plaintiffs. Okay? Not too much more past that. But it may be that we do a little bit more, because there will be so many people, and in-court venire will be so slow, we might want to have a longer one. So just start thinking about that.

Now, I am not at all, I do not want, I will not send a 30-page, you know, torture session to these poor people in the jury pool to fill out. Okay? But if you can come up with, say, 10 salient questions that you think would really help streamline the voir dire in court, that would be great. Okay? Ten's just a number, but that's kind of the end of the scale you should be on.

MR. POMERANTZ: Your Honor, when do you need that by?

THE COURT: This is all -- you just think about it between now and September 7th. Okay? If you don't want to do it, I'm just saying, you maybe don't want to do it, that's fine. If you want to do it, this is the time to start

thinking about it.

Here's the third thing. We have been respecting -- I'm starting a trial on Monday. We've had all these, you know, COVID things. Typically with the parties' agreement, we have not been calling any people who are not fully vaccinated or who decline to state. There is, you may have seen press coverage, you may know personally, there is a little bit of a COVID resurgence now. You know, it's just going up and down. That appears to be the way it's going to happen.

The question is: Do you want to do anything about COVID at all. Okay? Do you even want to ask anymore? I'll leave it up to you. All right? So maybe you can tell me, you two get together and think, you don't even want to ask about vaccine status, you don't want to ask about health issues. Maybe this is the time, by the time we get to November, maybe it's just, we can do that. All right? I'll leave it up to you. Okay?

My concern is I don't want jurors to be thinking that they're going to get COVID. And I do talk with them about it, and I will say I've had three trials this year. About half the jurors in each of those trials wore masks. I leave that as an option.

So remember, you're in the bay area, so distinctive jury pool in some ways. So the goal is I'm not so concerned about transmission, because there's no evidence that

courtrooms have been, it's just an evidence-based assessment. But I am concerned about I don't want jurors sitting there not paying attention because he or she is freaking out about I'm going to get COVID from the person next to me. Okay? That's what I'm looking to manage.

So you two, you all think about that and decide what you want to do. You can tell me maybe on the 7th. Okay? Just 7th is preliminary thoughts. You don't have to have any deals.

Okay. Then the last thing is I do do 9:00 to 2:00. I'm willing to go longer if you want to. Okay? I will just tell you, and I'm sure you know from your own experience, I do think diminishing returns set in in the afternoon, and we do have the phenomenon of bay area traffic, so I wouldn't want to go past 4:00. I mean, to be honest, even at 4:00 it's starting to get bad, but I wouldn't want to go past 4:00. So we could do 9:00 to 4:00 with the lunch break, or we could do 9:00 to 2:00 with no break. So let's just start thinking about nuts and bolts about mechanics like that.

MR. POMERANTZ: Your Honor, what about Thursdays? Have you ... what's your view on --

THE COURT: You mean Fridays?

MR. POMERANTZ: I thought you --

THE COURT: I do Fridays are dark.

MR. POMERANTZ: Oh, Fridays are dark?

THE COURT: Yeah. You know, I could probably do that -- I can't just not do anything for three months, so I have to have some days when I have, you know, criminal calendar and other things. So, but maybe we could do, you know, alternate weeks Monday through Friday, 9:00 to 4:00, maybe the next week just Monday through Thursday so I have a day to catch up. You know, some -- just think about that. Okay?

MR. POMERANTZ: What is your practice about the week of Thanksgiving? We're probably going to go through Thanksgiving, so what is your --

THE COURT: Well, I would have you here until Tuesday, I think.

MR. POMERANTZ: So Monday and Tuesday of that week?

THE COURT: Yeah, Monday and Tuesday, and you can have Wednesday off.

When I was in practice, I had this one judge in Massachusetts who just did not want to try my case. And so she set me for the Monday after Thanksgiving and made sure that we didn't close until January 2nd. And we did it, yes, but I'm not doing that to you, but we do have to take those things into account.

MR. POMERANTZ: Thank you, Your Honor.

THE COURT: All right. Anything else from the parties for today?

MR. GLACKIN: No, Your Honor.

THE COURT: All right. Defendants?

MR. POMERANTZ: No, Your Honor.

THE COURT: All right. Great.

Thanks for coming in. I will have those expert follow-up things out as soon as I can.

(Proceedings concluded at 1:51 p.m.)

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I N D E X

Motions Hearing

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E X H I B I T S

(None.)

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CERTIFICATE OF REPORTER

I, Stephen W. Franklin, Registered Merit Reporter, and Certified Realtime Reporter, certify that the foregoing is a correct transcript, to the best of my ability, from the record of proceedings in the above-entitled matter.

Dated this 5th day of AUGUST, 2023.

/s/Stephen W. Franklin

Stephen W. Franklin, RMR, CRR